No. 89-1838
No. 89-1845

Supreme Court, U.S.
FILED
NOV 15
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ARABIAN AMERICAN OIL CO.,
Respondent.

ALI BOURESLAN,
Petitioner,

v.

ARABIAN AMERICAN OIL CO.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN JEWISH COMMITTEE, THE AMERICAN JEWISH CONGRESS, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AND THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

PAMELA S. KARLAN
University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-7810

JULIUS LEVONNE CHAMBERS
*CHARLES STEPHEN RALSTON
The NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, N.Y. 10013
(212) 219-1900

[Additional Counsel Listed on Inside Front Cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

AMY ADELSON
LOIS WALDMAN
MARC D. STERN
American Jewish Congress
15 East 84th Street
New York, N.Y. 10028
(212) 879-4000

SAMUEL RABINOVE
The American Jewish Committee
165 E. 56th Street
New York, N.Y. 10022
(212) 751-4000

RUTH L. LANSNER
STEVEN M. FREEMAN
JILL L. KAHN
The Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, N.Y. 10017
(212) 490-2525

DONNA R. LENHOFF
Women's Legal Defense Fund
2000 P Street, N.w.
Suite 400
Washington, D.C. 20036
(202) 887-0364

*Counsel of Record

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 9

INTRODUCTION 9

I. TITLE VII WAS ENACTED AGAINST THE BACKDROP OF CONGRESS' LONG-STANDING CONCERN WITH ENSURING EQUAL EMPLOYMENT OPPORTUNITIES IN INTERNATIONAL COMMERCE FOR AMERICAN CITIZENS 12

II. ONE OF THE PURPOSES OF THE CIVIL RIGHTS ACT OF 1964 WAS TO PROMOTE NONDISCRIMINATION ABROAD 25

III. SECTION 702 SHOULD BE CONSTRUED TO GIVE TITLE VII EXTRATERRITORIAL APPLICATION IN LIGHT OF CONGRESS' CLEARLY EXPRESSED CONCERN WITH FAIR EMPLOYMENT OVERSEAS 31

IV. SUBSEQUENT LEGISLATION ALSO DEMONSTRATES CONGRESS' INTENTION TO PROVIDE EQUAL EMPLOYMENT OPPORTUNITY FOR AMERICAN CITIZENS IN THE INTERNATIONAL WORKPLACE 36

CONCLUSION 41

TABLE OF AUTHORITIES

Cases: *Pages:*

Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986) 18, 39

Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682 (1976) 11

American Jewish Congress v. Arabian American Oil Co., No. C-4296-56 (N.Y. State Comm'n Against Discrimination Jan. 26, 1959) 22

American Jewish Congress v. Carter, 190 N.Y.S.2d 218, 221 (Sup. Ct. 1959), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (App. Div. 1960), *aff'd*, 9 N.Y.2d 227, 213 N.Y.S.2d 60 (1961) 4, 10, 23, 24

Boureslan v. American Arabian Oil Co, 653 F. Supp. 629, 629 (S.D. Tex. 1987), *aff'd* 857 F.2d 1014, 1016 (5th Cir. 1988), *vacated for rehearing en banc and aff'd*, 892 F.2d 1271 (5th Cir. 1990) (*en banc*) 18, 31

Diaz v. Pan American World Airways, 454 F.2d 234 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) 39

Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 33

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) 11

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 2

Pages:

Hardin v. City Title & Escrow Co., 797 F.2d 1037 (D.C. Cir. 1986) 32

House v. Commissioner, 453 F.2d 982 (5th Cir. 1972) 32

International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1358-61 (9th Cir. 1981) (same), *cert. denied*, 454 U.S. 1163 (1982) 11

NAACP v. Button, 371 U.S. 415 (1963) 2

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 1

Regents v. Bakke, 438 U.S. 265 (1978) 25

United Steelworkers v. Weber, 443 U.S. 103 (1979) . 13

Statutes and Resolutions:

29 U.S.C. § 213(f) 19

42 U.S.C. § 1981 34

50 U.S.C. App. § 2402(5)(A) 36

50 U.S.C. App. § 2407(a) 37, 38

Civil Rights Act of 1964, § 701, 42 U.S.C. § 2000e . 33

Civil Rights Act of 1964, § 702, 42 U.S.C. § 2000e-1 . . . . . 31, 32, 34

Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2. 33

Pages:

S. Res. 323, 84th Cong., 2d Sess. (1956) 14-16, 22

Legislative History:

102 CONG. REC. 14330 (July 25, 1956) 15

102 CONG. REC. 14732 (July 26, 1956) 16

102 CONG. REC. 14733 (July 26, 1956) 17

Civil Rights-Public Accommodations: Hearings on S. 1732 Before the Sen. Comm. on Commerce, 88th Cong., 1st Sess. (1963) 26-30

H.R. Rep. No. 190, 95th Cong., 1st Sess. (1977) 37, 40

S. Rep. No. 872, 88th Cong. 2d Sess. (1964) 22

S. Rep. No. 2790, 84th Cong., 2d Sess. (1956) 15

Other Materials:

M. BORDEN, JEWS, TURKS, AND INFIDELS (1984). . . . 14

Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61 (1988). 26

Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUST. REL. L.J. 429 (1985). 10

Pages:

Letter from Secretary of State John Foster Dulles to Philip Klutznick, President of B'nai B'rith (Aug. 14, 1956) . . 23

Letter from Assistant Secretary of State William B. Macomber, Jr. to Sen. E.L. Bartlett (July 29, 1959) . . 24

Note, *Title VII and the Arab Boycott*, 12 HARV. C.R.-C.L. L. REV. 181 (1977). 36

Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U.J. INT'L L. & POL. 357 (1987). 18

No. 89-1838
No. 89-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ARABIAN AMERICAN OIL CO.,
Respondent.

ALI BOURESLAN,
Petitioner,

v.

ARABIAN AMERICAN OIL CO.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN JEWISH COMMITTEE, THE AMERICAN JEWISH CONGRESS, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AND THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation that was established for the purpose of assisting black citizens in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963).

A significant portion of the Fund's litigation has concerned Title VII of the Civil Rights Act of 1964 and the proper scope of constitutional and statutory rights to equal employment opportunity. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Fund has long been committed to the proposition that full equality of economic opportunity requires applying prohibitions on discrimination in employ-

[1]Letters of consent to the filing of this Brief have been filed with the Clerk of Court.

ment to American corporations regardless of where such discrimination occurs.

The American Jewish Committee ("AJC") is a national membership organization, founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that these rights can be secure for Jews only if they are equally secure for Americans of all faiths, races, and ethnic backgrounds. AJC, therefore, has been actively involved in the civil rights cause since its inception in the 1930s, and strongly supported enactment of the Civil Rights Act of 1964. This organization has always urged that civil rights laws be interpreted broadly to effectuate their purposes. That is why AJC believes that Title VII should be interpreted to apply to discrimination outside the United States by an American corporation against an American citizen employee.

The American Jewish Congress is a national membership organization founded in 1918 for the

preservation of the security and the constitutional and civil rights of Jews in America through guaranteeing the rights of all Americans. Since 1959 when as a plaintiff in *American Jewish Congress v. Carter*, 190 N.Y.S.2d 218, 221 (Sup. Ct. 1959), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (App. Div. 1960), *aff'd*, 9 N.Y.2d 227, 213 N.Y.S.2d 60 (1961), it successfully litigated under New York anti-discrimination law to ban Aramco's discriminatory employment practices from New York State, the American Jewish Congress has fought to assure equality of employment opportunity for Americans both at home and abroad. It has brought and successfully settled cases involving fact patterns identical to those in the instant case. It believes reversal of the decision below is necessary to preserve the continued vitality of Title VII as a means to prevent and remedy discrimination in employment against Americans in the international work place.

The Anti-Defamation League of B'nai B'rith (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all races a creeds, and specifically to combat racial and religious discrimination both in the United States and abroad. Among the many activities directed towards these goals, in 1977 ADL fought successfully for the passage of the antiboycott provisions of the Export Administration Act (EAA), which prohibit U.S. companies from discriminating against U.S. citizens in order comply with the Arab boycott of Israel and Israeli interests. Subsequently, ADL filed *amicus* briefs in cases involving a private right of action under the EAA, including *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), and *Bulk Oil (Zug) A.G. v. Sun Company, Inc.*, 583 F. Supp. 1134 (S.D.N.Y. 1983), *aff'd*. 742 F.2d 1431 (2d Cir.), *cert. denied*, 469 U.S. 835 (1984). Moreover, ADL has a consistent record of fighting employment discrimination in a variety of domestic contexts, and has

filed *amicus* briefs in cases such as *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) (holiday observance); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984)(sex discrimination); and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)(racial discrimination).

ADL submits the accompanying brief because we believe this Court will decide the important issue of whether an American who is the target of employment discrimination by a U.S. company doing business abroad should be afforded the same legal protection as one who is subject to employment discrimination by a U.S. company doing business in this country. ADL has a vital interest in ensuring that Americans are protected from employment discrimination both at home and abroad, and we therefore support the extraterritorial application of Title VII of the Civil Rights Act of 1964 with regard to Americans employed by American companies.

The Women's Legal Defense Fund is a non-profit, tax-exempt membership organization, founded in 1971 to provide *pro bono* legal assistance to victims of discrimination based on sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, public education, and advocacy before the EEOC and other federal agencies that are charged with enforcement of equal employment laws.

SUMMARY OF ARGUMENT

I.

As early as 1956, Congress made clear its concern with ensuring equal employment opportunities for American citizens working abroad for American corporations. In particular, the Senate passed a resolution stating that it was against national policy for there to be distinctions based on

religion in the negotiations of trade agreements between the United States and foreign nations. This historical background must be considered in interpreting Title VII of the Civil Rights Act of 1964.

II.

A specific purpose of the Civil Rights Act of 1964 was to promote nondiscrimination abroad. The ending of racial discrimination within the United States was considered key to enhancing America's image and to affect discrimination in other countries by setting a standard for the world.

III.

The language of Title VII supports the conclusion that it applies to the employment practices of American companies operating abroad. The Fifth Circuit's construction of the statute is artificially narrow and inconsistent with the terms of the statute.

IV.

In subsequent legislation, Congress has demonstrated its intention to provide equal employment opportunity for American citizens working abroad. The Export Administration Act expressly covers discrimination against Americans by American corporations operating abroad. It would be wholly inconsistent with Congress' intent to give Title VII a more limited scope.

ARGUMENT

INTRODUCTION

This is not the first time that respondent Arabian American Oil Co. ("Aramco") has sought to insulate its treatment of American citizens from scrutiny under equal employment opportunity laws by pointing to the international nature of its business. Thirty years ago, Aramco argued that its refusal to hire Jews should be immune from the reach of a state antidiscrimination statute that served as one of the

models for Title VII[2] because Jews were not permitted entry into Saudi Arabia and because the Saudi government, on whose good will Aramco was economically dependent, disapproved of Aramco's employing Jews anywhere. *See American Jewish Congress v. Carter*, 190 N.Y.S.2d 218, 221 (Sup. Ct. 1959), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (App. Div. 1960), *aff'd*, 9 N.Y.2d 227, 213 N.Y.S.2d 60 (1961) (rejecting Aramco's position).

The argument accepted by the Fifth Circuit in this case represents a significant expansion of this already-discredited position, for the Fifth Circuit's opinion gives American companies a blanket license to discriminate in their overseas operations as they see fit, regardless of the laws or customs of other counties. The Fifth Circuit did not find that Aramco's discriminatory conduct is somehow *required* by a foreign government. Thus, this case does not raise

---

[2] *See generally* Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUST. REL. L.J. 429, 568-73 (1985).

potentially troublesome issues concerning the act of state and foreign compulsion doctrines. *Cf., e.g., Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 705 n. 18 (1976) (plurality opinion) (discussing doctrines); *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358-61 (9th Cir. 1981) (same), *cert. denied*, 454 U.S. 1163 (1982). Rather, the Fifth Circuit excused an American corporation from complying with a statute expressing our Nation's "highest priority," *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)), because it assumed that Congress failed to express an intention that Title VII apply extraterritorially. *See Boureslan v. Aramco*, 892 F.2d 1271, 1273-74 (5th Cir. 1990) (*en banc*).

That assumption is critically flawed. It reflects an improperly cramped view of the available evidence regarding Congress' concern with the overseas employment opportunities of American citizens and the overseas em-

ployment practices of American corporations. That evidence clearly shows that Congress has long been concerned with ensuring equal employment opportunities for American citizens in international commerce. In light of that evidence and relevant principles of statutory construction, § 702 provides additional evidence that Title VII should be given extraterritorial effect with regard to American citizens employed by American companies.[3]

I. TITLE VII WAS ENACTED AGAINST THE BACKDROP OF CONGRESS' LONG-STANDING CONCERN WITH ENSURING EQUAL EMPLOYMENT OPPORTUNITIES IN INTERNATIONAL COMMERCE FOR AMERICAN CITIZENS

The Civil Rights Act of 1964 was not passed in a vacuum. To understand the scope Congress intended the Act to have, one must examine Congress' prior treatment of the

[3] Judge King's persuasive dissent and the arguments advanced by the Equal Employment Opportunity Commission and the private petitioner address in detail the general principles of statutory construction that should govern this case and much of the relevant evidence in the legislative history of Title VII. We do not repeat their analyses in this brief.

question of discrimination abroad by American companies against American citizens. *Cf. United Steelworkers v. Weber*, 443 U.S. 103, 201 (1979) (Title VII must be construed in "the historical context from which the Act arose"). Examination of this issue strongly supports extraterritorial application of Title VII, for, prior to the passage of Title VII, Congress had expressed a forceful commitment to eliminating employment discrimination abroad against American citizens.

There are two distinct contexts in which employment discrimination against Americans overseas might occur: (1) the discrimination might be required by the laws of a foreign government or (2) the foreign government might be neutral as to the permissibility of such discrimination. Obviously, the former situation presents a stronger argument for confining American fair employment laws within United States borders, since it involves a square conflict of laws and sovereignty. Even in this more potentially troublesome

context, however, Congress has repeatedly manifest its desire to extend principles of nondiscrimination in employment as far as possible. Senate Resolution 323, 84th Cong., 2d Sess. (1956), represents an express statement of this congressional commitment to extraterritorial equal employment opportunity.

During the 1950's, Congress became increasingly concerned with the refusal of American corporations doing business with the Arab world to hire American Jews.[4] In 1956, the Senate unanimously passed a resolution condemning discrimination in overseas employment on the basis of religion:

> Whereas the protection of the integrity of United States citizenship and of the proper rights of United States citizens in their pursuit of lawful trade, travel, and other activities abroad is a principle of United States sovereignty; and
>
> Whereas it is a primary principle of our Nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinctions among our citizens in the granting of personal or commercial access or any other rights otherwise available to United States citizens generally is inconsistent with our principles; Now, therefore, be it
>
> *Resolved*, That it is the sense of the Senate that it regards any such distinctions directed against United States citizens as incompatible with the relations that should exist among friendly nations, and that in all negotiations between the United States and any foreign state every reasonable effort should be made to maintain this principle.

S. Res. 323, 84th Cong. 2d Sess. (1956) (*quoted in* 102 CONG. REC. 14330 (July 25, 1956)).

The discussion on the floor of Senate Resolution 323 further illustrates Congress' desire to assure that American citizens abroad enjoy, to the maximum extent possible, the same equal employment opportunity they enjoy within the United States.[5] Senator Lehman (D.-N Y.), the primary

[4] This was not, however, the first time Congress had expressed this concern. As early as the 1850's, Congress had passed resolutions urging other nations not to discriminate among American citizens on the basis of religion, and had refused to accept foreign commerce treaties that did not provide for nondiscrimination among American citizens. *See* M. BORDEN, JEWS, TURKS, AND INFIDELS 82-88, 94-96 (1984).

[5] The Committee on Foreign Relations recommended passage of the resolution without objection. The committee report that accompanied the resolution, S. REP. No. 2790, 84th Cong., 2d Sess. (1956), stated succinctly that "[t]he resolution speaks for itself."

sponsor of S. Res. 323,[6] stated that the purpose of the resolution was to prevent foreign employment practices, even those compelled by foreign governments, from making "second-class citizens of some . . . Americans . . . ." 102 CONG. REC. 14732 (July 26, 1956).[7] He explained that the resolution should govern the negotiation of trade agreements to make sure that such agreements

> expressly provide that no United States citizen shall, solely because of religious affiliation or derivation, be denied the *advantages of . . . employment* . . . or any other benefit made possible by such treaty, convention or agreement.

Id. (Emphasis added.)

Two of Senator Lehman's remarks are particularly salient to the issue now before this Court. First, Senator

[6] Sen. Lehman received unanimous consent to put his testimony in the record "to supplement the language of the resolution itself." 102 CONG. REC. 14732 (July 26, 1956).

[7] Several senators who spoke in favor of the resolution stated that the integrity of United States sovereignty and citizenship would be compromised if Americans overseas were subject to discrimination in employment on the basis of religion. *See, e.g., id.* at 14731 (July 26, 1956) (statement of Sen. Morse); *id.* at 14733 (statement of Sen. Neuberger); *id.* (statement of Sen. Humphrey).

Lehman expressly linked the application of principles of non-discrimination to foreigners within the United States to the United States' right to insist that American citizens be treated fairly abroad. *Id.* at 14733; *see also id.* (statement of Sen. Morse) (resolution "will demonstrate once again -- and it is time we made it clear -- that a basic idea of America, not only in foreign relations, but in domestic policy, is that there can be no question raised as to the rights of our citizens based upon religious faith.").

Second, Senator Lehman recognized the potential *domestic* effect of sanctioning discrimination abroad. *Id.* In order to assure nondiscrimination at home by transnational employers it would be necessary to press for nondiscrimination abroad.

The phenomenon identified by Senator Lehman--the interdependence of the domestic and international employment markets--is especially important in understanding how the Fifth Circuit's interpretation threatens

to undermine Congress' intentions in enacting Title VII. Title VII was intended to expand the employment opportunities available to racial, ethnic, and religious minorities and to women. In today's multinational economy,[8] an individual's advancement within a corporation may often be dependent on training, experience, and contacts that occur abroad. *See, e.g., Abrams v. Baylor College of Medicine*, 805 F.2d 528, 530 (5th Cir. 1986) (higher incidence of certain heart diseases in Saudi Arabia meant that cardiologists who spent time in program run by Baylor there received "a greater opportunity for clinical experience . . . than is generally available in America"). Moreover, many decisions regarding positions abroad are in fact made in the United States. *See, e.g., Boureslan v. American Arabian Oil Co*, 653 F. Supp. 629, 629 (S.D. Tex. 1987), *aff'd* 857 F.2d 1014, 1016 (5th Cir. 1988), *vacated for*

[8] *See, e.g.*, Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U.J. INT'L L. & POL. 357, 358 (1987) (2000 U.S. firms operate 21,000 foreign subsidiaries in 121 countries).

rehearing en banc and aff'd, 892 F.2d 1271 (5th Cir. 1990) (*en banc*) (Boureslan requested and was given a transfer to Aramco and its Saudi operations while he was working at ASC in Houston, Texas). If racial, religious, and ethnic minorities or women lose their right to fair treatment whenever they spend time working for their American employer's overseas operations, they face a Hobson's choice. If they choose not to take jobs that require working abroad[9] in order to remain under Title VII's protection, they will be less competitive in seeking jobs *within the United States* because they will lack the experience and contacts that persons who have taken such jobs obtain. If, on the other hand, they take overseas positions, they may be discriminat-

[9] This may even preclude accepting assignments that require protracted overseas travel. The stringent territorial restriction of Title VII required by the panel's interpretation might mean, for example, that sexual harassment of a female employee on a two-week business trip to Asia would be beyond the reach of Title VII even though both the supervisor and the victimized subordinate are American citizens employed by an American corporation in an American office. *Cf.* 29 U.S.C. § 213(f) (Fair Labor Standards Act does not apply to "any employee whose services during the work week are performed in a workplace within a foreign country").

ed against as soon as they arrive on foreign soil. If they are fired, or harassed into quitting, by discrimination that would be forbidden if it occurred within the United States, the termination of their relationship with the American-based employer will preclude their later moving up the corporate ladder into domestic positions.

Moreover, if a substantial number of potential employees refuse to work overseas because to do so would strip them of fundamental protections, employers may have to pay a premium to induce potential employees to work abroad. White Anglo-Saxon male workers will benefit disproportionately from such a premium, since they will be less likely to be at risk of discrimination. Ultimately they will receive both a direct premium -- from accepting overseas assignments -- and an indirect competitive advantage against their minority or female competitors who have not received the training or experience acquired from overseas employment.

Finally, the Fifth Circuit's approach creates a massive loophole for companies that wish to circumvent Title VII. In essence, it permits employers to "launder" their discrimination just as offshore banks permit criminals to "launder" illegally acquired funds. For example, a company that wants to fire a female employee need only transfer her to an overseas office. It can then terminate her without facing Title VII liability. Even the threat of being sent overseas, when coupled with the likely prospect of harassment or discharge without redress under Title VII may cause an employee's resignation or acquiescence in discriminatory treatment. For example, a company that wishes to exclude women from certain positions *in its United States operations* may be able to induce female employees to refrain from seeking the positions by requiring all employees seeking the position to serve overseas and by doing nothing

to discourage sexual harassment in its operations abroad.[10]

S. Res. 323 reflected a broad consensus within the legislative and executive branches regarding equal employment opportunities in international commerce.[11]

---

[10] The Fifth Circuit's opinion poses another potential threat to employment opportunities within the United States. To the extent that American companies believe they can reduce costs by exporting American jobs overseas, they will do so. The effect will be to diminish the number of available domestic jobs. To the extent that a corporation views compliance with principles of fair employment as a cost, releasing the company from compliance with those principles creates an incentive for the company to move those jobs offshore even when it continues to fill the jobs with American citizens. The net result is either that it will then not hire protected groups to fill the jobs or that it will not give those groups the protection they would enjoy in domestic employment situations. In either event, those groups' employment opportunities will be diminished. In short, the Fifth Circuit has created an incentive for American companies to export American jobs.

[11] The 1956 platforms of both political parties expressed similar sentiments. The Democratic platform stated that "We oppose, as contrary to American principles, the practice of any government which discriminates against American citizens on grounds of race and religion. We will not countenance any arrangement or treaty with any government which by its terms or in its practical application would sanction such practices." The Republican platform stated that "We approve appropriate action to oppose the imposition by foreign government of discrimination against United States citizens based on their religion or race." *Quoted in American Jewish Congress v. Arabian American Oil Co.*, No. C-4296-56 (N.Y. State Comm'n Against Discrimination Jan. 26, 1959). *Cf.* S. REP. No. 872, 88th Cong. 2d Sess. (1964), *reprinted in* 1964 U.S. CONG. CODE & AD. NEWS 2355, 2362-63 (Senate report accompanying Civil Rights Act of 1964 quotes 1960 platforms of Democratic and Republican parties to show national commitment to "equal opportunity and elimination of racial discrimination").

Secretary of State John Foster Dulles responded to questions about the opportunities of American Jews to work abroad by writing that "[i]t is the policy of the Department of State not to acquiesce in any discriminatory practices, but to point out to the leaders of the Arab states the equality of all Americans irrespective of race or creed under the Constitution and laws." Letter from Secretary of State John Foster Dulles to Philip Klutznick, President of B'nai B'rith (Aug. 14, 1956), *quoted in American Jewish Congress v. Arabian American Oil Co.*, No. C-4296-56 at 6-7 (N.Y. State Comm'n Against Discrimination Jan. 26, 1959).[12] The Department reiterated this position in a 1959 letter written to Senator E.L. Bartlett regarding the then-pending *American Jewish Congress v. Carter* litigation:

---

[12] The letter continues: "We in the Department of State are particularly anxious to do what we can to insure that United States citizens in pursuit of legitimate trade, travel and other activities abroad will not face distinctions of the kind of which you write. Our posts in countries where discriminatory practices are followed have also been instructed to point out the strong feelings of the American public and of the Congress in this matter." *Id.* at 7.

> [T]he proper policy of our Government must be to work for the elimination of any procedures adopted by foreign states which tend to discriminate against our citizens in any way, including discrimination on the basis of race or religion.

Letter from Assistant Secretary of State William B. Macomber, Jr. to Sen. E.L. Bartlett (July 29, 1959), *quoted in* Brief of Petitioner-Respondent at 64, *American Jewish Congress v. Carter*, 199 N.Y.S.2d 158 (App. Div. 1960).

In sum, the enactment of Title VII must be viewed against the backdrop of the Senate's desire that Americans abroad be protected by the right to equal treatment they enjoyed at home. The discussion surrounding the unanimous passage of Resolution 323 and widespread concern with overseas employment opportunities for American religious minorities in the decade preceding the passage of Title VII strongly suggest that when Congress expanded federal protection of employment rights in 1964, it intended that the new protections, like their predecessors, extend to Americans overseas.

II. One of the Purposes of the Civil Rights Act of 1964 Was To Promote Nondiscrimination Abroad

The Civil Rights Act of 1964 represented a comprehensive attack on the problems of prejudice in public accommodations, employment, access to governmental services, and voting. Thus, the legislative history of the various titles can contribute to an understanding of the proper scope to be afforded particular provisions. *Cf. e.g.*, *Regents v. Bakke*, 438 U.S. 265, 353 (1978) (opinion of Brennan, White, Marshall, & Blackmun, JJ.) (interpreting Titles VI and VII in tandem).

The testimony presented in support of the public accommodations provisions of the Act by Secretary of State Dean Rusk demonstrates the Administration's intention that the enactment of antidiscrimination legislation in the United States serve to expand protections against discrimination abroad.

The fact that racial discrimination within the United States had injured America's image and impaired the conduct of its foreign relations had long been recognized. *See generally* Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (discussing foreign reactions to racial discrimination in employment, education, and public accommodations, and federal government's response to these reactions). But Secretary Rusk went beyond seeking a public accommodations law to eliminate damaging episodes of racial discrimination against foreign diplomats traveling in America. *See, e.g., id.* at 90-92; *Civil Rights-Public Accommodations: Hearings on S. 1732 Before the Sen. Comm. on Commerce*, 88th Cong., 1st Sess. 283-87 (1963) (statement of Secretary Rusk). He argued instead that the foreign affairs implications of such a law extended to its potential effect on discrimination *in other countries*. For example, he suggested that the United States' treatment of foreigners should "se[t] a standard for all the world." *Id.* at

283. In addition, he echoed the theme of interdependence identified above:

> For example, the Department of State has a duty to assist and protect American citizens traveling abroad--and without regard to race, religion, or national origin of the particular American citizen.
>
> Now, against a background of, shall I say, disability in our own country on some of these same issues, our voice abroad, in seeking to protect American citizens abroad, is somewhat muted and uncertain. And I think this affects the elements of reciprocity under the conduct of our foreign relations as well as the broader issues in what might be called the propaganda and political field.

Id. at 290. Thus, Secretary Rusk both identified the United State's pre-existing commitment to assuring equal protection for American citizens overseas and recognized the effect domestic treatment might have on the conduct of foreign affairs. The latter point further highlights the propriety of giving Title VII extraterritorial effect: foreigners' closest exposure to American principles of nondiscrimination is likely to come when those principles are demonstrated to

them in their own country.[13]

In addition, Secretary Rusk explicitly made the point that American laws might affect laws overseas. Senator Thurmond referred to Secretary Rusk's statement that racial discrimination was not unique to the United States but occurred in many countries, and asked the Secretary in light of that fact and the proposed Title VI (which denies federal funds to institutions that discriminate) whether foreign aid should be denied to other nations that discriminated. The Secretary recognized that "[w]hen we are dealing with the rest of the world we are dealing with a world which we can influence, but cannot control," and thus that cutting off aid might be a counterproductive strategy for influencing other nations. But he went on to state that:

> In the rest of the world we are waging a struggle for freedom. . . . We must stay with that struggle, use our influence to the best of our ability to sustain and strengthen the cause of freedom; and

[13] Thus, for example, American principles of racial equality were powerfully demonstrated by the appointment of a black ambassador to South Africa.

> that would mean we would work at it, use our influence, even though we can't necessarily control the result.
>
> Our influence in these situations can be very strong. I think there are differences between situations where governmental laws and constitutional practices are responsible for the discrimination, and where you run into discriminatory situations simply because of the existence of religious and racial groups next to each other, with the social problems that have historically been associated with those situations.
>
> *Our influence has been in the direction o[f] removing these discriminations abroad as well as at home.*
>
> I think our advice in this respect would be more powerful if we could move forward at home more rapidly.
>
> . . . I do not think we should abandon the great struggle for freedom throughout the world . . . .

Id. at 299. (Emphasis added.)

In light of Secretary Rusk's testimony, the committee chairman, Senator Warren Magnuson stated that discrimination abroad should not lead the United States to "abandon our purpose to show the world the kind of leadership that would erase discrimination in the world." *Id.* at 306. He concluded:

> Our positive action toward a firm national policy on this is going to be very helpful to the people in other countries who want to abolish this sort of thing *in their countries*.

Id. (emphasis added).

Congress chose to give extraterritorial effect to Title VII because to do so clearly would serve the central foreign policy goals connected with the Civil Rights Act of 1964. By providing an illustration of the scope of American fair employment law within foreign territories, it would graphically demonstrate the level of American commitment to ideals of nondiscrimination. Moreover, it would also provide an incentive for foreign citizens to press their governments to institute similar guarantees.

III. Section 702 Should Be Construed To Give Title VII Extraterritorial Application In Light of Congress' Clearly Expressed Concern With Fair Employment Overseas

The Fifth Circuit rejected the argument that section 702, 42 U.S.C. § 2000e-1, indicates Congress' intention to give Title VII extraterritorial effect. It held instead that section 702 was intended to ensure the extension of Title VII's protection to aliens working within the United States. *See Boureslan*, 892 F.2d at 1274. This artificially narrow interpretation substantially distorts the statutory framework.

The section provides:

> § 702. Exemptions
>
> This Title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

The first thing to note about section 702 is its descriptive subheading: "Exemptions." *See Hardin v. City*

Title & Escrow Co., 797 F.2d 1037, 1039 (D.C. Cir. 1986) (description of statutory provision contained in subheading that appears in enactment itself "constitutes an indication of congressional intent"); *House v. Commissioner*, 453 F.2d 982, 987 (5th Cir. 1972) (subheadings may aid courts in "com[ing] up with the statute's clear and total meaning"). Had Congress intended the interpretation given by the court below, it would have made far more sense to place the discussion of the rights of aliens in a section entitled "Inclusion of Aliens."

The fact that Title VII's applicability to religious entities appears in the same section further strengthens this conclusion. The meaning of section 702 with respect to religious institutions employing more than a specified number of workers is clear: absent the section, Title VII would cover them.[14] A similar interpretation should be

[14] Surely, the court of appeals would not have interpreted the latter part of section 702 as indicating the kind of employers (*i.e.*, groups that are not "religious corporation[s], association[s], educational institution[s], or societ[ies]") to which Title VII *was* intended to apply.

given to the part of section 702 dealing with aliens: absent section 702, any employer falling within the definitional provisions of sections 701(a), (b), (g), and (h) -- that is, a sufficiently large employer engaged in specified types of commerce -- would be subject to Title VII with respect to *all* its employees, including all aliens.

Section 703 gives additional support to this view. Section 703 protects "individual[s]." It does not limit its protection to citizens. Thus, had there been no mention of aliens in section 702, Title VII would still have protected aliens to the same extent it protected citizens.[15] Congress clearly understands the difference between providing protection to individuals and to citizens. *See, e.g.*, 42

[15] *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 95 (1973), is not to the contrary. There, this Court drew a "negative inference" from section 702 that aliens employed within the United States *were* covered. In other words, this Court held that a decision *to exempt* aliens in certain circumstances necessarily implied that they were *not* exempted in other circumstances.

The court of appeals' statement regarding Boureslan's attempt to draw a "negative inference" misperceives the nature of such an inference. The argument in favor of extraterritorial application does *not* depend on a negative inference. Rather, the fact that an exemption is created suggests that there is something from which exemption is necessary.

U.S.C. § 1981 ("*[a]ll persons* within the jurisdiction of the United States shall have the same right" with regard to certain activities "as is enjoyed by white *citizens*") (emphasis added). Indeed, the heightened scrutiny to which distinctions based on alienage are subject, *see, e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971), suggests that courts should be loath to adopt an interpretation of a statute that makes such a distinction in the absence of a clear congressional intention to do so. In short, the purpose of section 702 cannot have been to include domestic aliens within Title VII's protections.

Finally, the congressional and executive concerns with ensuring equality for all Americans in the international workplace and fostering nondiscrimination throughout the world strongly counsel interpreting section 702 as a narrow exemption from Title VII's commands rather than as a broad exemption. The justification for any alien exemption must lie in the potential conflict of laws that applying American

antidiscrimination law might create. Applying American laws abroad only when both parties to the employment relationship are American citizens -- that is, adopting the position advanced in this brief -- represents the most reasonable accommodation of these competing concerns. In cases involving two American entities, there is a far greater federal interest in applying United States statutes. Moreover, traditional principles of international law regarding acts of state and foreign compulsion remain available to alleviate particular conflicts. Thus, this Court should conclude that, in including section 702 within Title VII, Congress intended only to reduce the potential for statutory conflict by exempting a class of workers from Title VII's ambit as to whom the United States had a less significant relationship. Congress intended, however, to provide the maximum possible equal employment opportunity to each American citizen.

IV. Subsequent Legislation Also Demonstrates Congress' Intention To Provide Equal Employment Opportunity for American Citizens in the International Workplace

On several occasions subsequent to the original passage of Title VII, Congress has addressed the issue of equal economic access to the international marketplace for all Americans regardless of their ethnic or religious background. In particular, Congress' treatment of the Arab boycott buttresses the conclusion that Title VII was intended to have extraterritorial effect. *See generally*, Note, *The Arab Boycott and Title VII*, 12 Harv. C.R.-C.L. L. Rev. 181 (1977).

The Congressional declaration of policy accompanying the Export Administration Act states, among other things, that "[i]t is the policy of the United States . . . to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against . . . any United States person . . . ." 50 U.S.C. App. § 2402(5)(A). The Act requires the president to issue regulations prohibiting any United States

"person" (which includes any American corporation) from

> Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

Id. § 2407(a)(1)(B).

The legislative history of the Export Administration Amendments of 1977 expressly states that boycotts of U.S. companies "because of race, religion, or national origin . . . [are] clearly against the spirit and intent of U.S. law, including the civil rights and equal opportunity laws," and that the prohibition against discrimination in the Export Administration Act is intended to apply to "U.S.-controlled subsidiaries and affiliates abroad" except when there would be an "intractable conflict . . . with specific laws of foreign countries . . . ." H.R. Rep. No. 190, 95th Cong., 1st Sess. 51 (1977).

The exemption contained in the Act provides an appropriate model for construing Title VII's extraterritorial

effect. The Export Administration Act does provide an exemption for "compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein." *Id.* § 2407(a)(2)(F). But that exemption is far narrower than the exemption judicially granted by the Fifth Circuit in this case. Note that the Export Administration Act exemption does *not* protect American employers when they *choose* to discriminate in a foreign country which does not *affirmatively require* such discrimination. In short, it merely codifies the defense of foreign compulsion. In this case, by contrast, there is no claim that Saudi Arabia *required* the harassment of Lebanese-American employees. And the Export Administration Act expressly provides that "[n]othing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States." *Id.* § 2407(a)(4).

Moreover, such a model would also be consistent with this Court's longstanding approach to another limitation on the scope of Title VII, the bona fide occupational qualification (BFOQ). *See Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (the BFOQ "is an extremely narrow exception"); *see also Abrams*, 805 F.2d at 533 n. 7 (interpreting BFOQ to avoid collision with Export Administration Act); *Diaz v. Pan American World Airways*, 454 F.2d 234 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)(Title VII's broad remedial purposes are best served by reading any restrictions on the extent of its protections as narrowly as possible). In this case, this principle is best served by holding that Title VII does have an extraterritorial effect.

Thus, the Export Control Act and Congress' treatment of the Arab boycott in the legislative history show a profound congressional desire that American companies, including American companies operating abroad adhere to

the maximum extent possible to American principles of nondiscrimination. They represent the latest expression of a principle that has consistently been expressed since the 1950's. This pervasive concern with "'the right of Americans to engage in international commerce without being subjected to discrimination,'" H.R. Rep. 190 at 47 (additional views of Rep. Benjamin S. Rosenthal) (quoting President Jimmy Carter), militates strongly in favor of construing Title VII to have an extraterritorial effect.

The Export Control Act shows that Congress does not believe that American foreign policy objectives will be compromised by a general insistence that American corporations comply with principles of nondiscrimination. Indeed, it shows Congress' intention that these principles be limited only when they cause an irreconcilable conflict. This Court should interpret Title VII's extraterritorial effect in a parallel manner and deny American companies a blanket license to discriminate against American citizens overseas

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fifth Circuit and hold that petitioners have stated a cause of action under Title VII.

Respectfully submitted,

PAMELA S. KARLAN
University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-7810

JULIUS LEVONNE CHAMBERS
*CHARLES STEPHEN RALSTON
The NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, N.Y. 10013
(212) 219-1900

AMY ADELSON
LOIS WALDMAN
MARC D. STERN
American Jewish
Congress
15 East 84th Street
New York, N.Y. 10028
(212) 879-4000

SAMUEL RABINOVE
The American Jewish
Committee
165 E. 56th Street
New York, N.Y. 10022
(212) 751-4000

RUTH L. LANSNER
STEVEN M. FREEMAN
JILL L. KAHN
The Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, N.Y. 10017
(212) 490-2525

DONNA R. LENHOFF
Women's Legal Defense
Fund
2000 P Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-0364

*Counsel of Record

Attorneys for Amici Curiae